Editor's Note: Reconsideration denied by order dated May 29, 2003

PARKWAY RETAIL CENTRE, LLC

IBLA 2000-252 Decided April 4, 2001

Appeal from a decision of the Las Vegas, Nevada, Field Office, Bureau of Land Management, assessing trespass damages for construction activities which encroached on adjacent public lands. NVN 066235.

Affirmed in part, reversed in part, set aside and remanded in part.

1. Trespass: Generally

The continued presence of construction equipment, materials, and waste on public lands without authorization under 43 C.F.R. § 2920.1-1 constitutes a trespass, subjecting the responsible parties to liability under 43 U.S.C. § 1733(g) (1994) and 43 C.F.R. § 2920.1-2.

2. Administrative Procedure: Administrative Record--Administrative Procedure: Administrative Review--Administrative Procedure: Decisions--Appeals: Generally--Trespass: Generally

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. A BLM decision claiming trespass damages for the unauthorized use of 3 acres of public lands will be set aside and the case remanded where neither the decision nor the case record provide any support for a finding that the trespass encompassed 3 acres.

3. Trespass: Measure of Damages

BLM is obligated to ensure that the compensation paid for use of the public lands, both in rent and trespass damages, represents not less than fair market rental value under the circumstances. Where BLM does not provide rationale supporting its determination to assess liability for a period of 6 months, its decision, when challenged, must be set aside and the matter remanded for further review.

4. Appraisals

A fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous.

5. Trespass: Measure of Damages

The regulation, 43 C.F.R. § 2920.1-2(b), allows BLM to assess more than fair market rental value for unauthorized uses of the public land in very limited circumstances, i.e., only when the trespass is not timely resolved following notice to the trespasser. In such a circumstance, it may collect double the fair market rental value for a nonwillful trespass and triple the fair market rental value for a knowing and willful trespass.

APPEARANCES: Thomas F. Kummer, Esq., and Lyssa M. Simonelli, Esq., Las Vegas, Nevada, for appellant Parkway Retail Centre, LLC; and Emily Roosevelt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Parkway Retail Centre, LLC (Parkway), appeals from a decision of the Las Vegas, Nevada, Field Office, Bureau of Land Management (BLM), dated April 20, 2000, determining that parties employed by Parkway had used without authorization public lands adjacent to Parkway's private lands, concluding that they had done so knowingly and willfully, and assessing Parkway rental and penalties in the amount of $156,816. In addition, BLM sought reimbursement of rents in the amount of $8,310 paid to Parkway for a billboard sign situated on public lands. A stay of the decision was granted by order of this Board dated June 16, 2000.

At issue here is the alleged unauthorized use of a portion of 12-1/2 acres of public lands situated in the NE¼SW¼ and the NW¼SW¼ of sec. 27, T. 20 S., R. 60 E., Mount Diablo Meridian, Clark County, Nevada (Parcel No. 138-27-301-001), within an urban area with rapidly increasing land values. 1/ To the immediate west and south of these lands are major roads (Summerlin Parkway and Buffalo Drive). The northwest lot, Lot A (see n.1 infra), is also bounded to the north by a major road (Washington

1/ In the course of our review, we will refer to the relevant aliquot parts as lots in the following manner:
Lot A - the area described as NW¼NW¼NW¼SW¼;
Lot B - the area described as SE¼NW¼NW¼SW¼;
Lot C - the area described as N½SE¼NW¼SW¼;
Lot D - the area described as NW¼SW¼NE¼SW¼.
This manner of identification has been employed by BLM in various reports.

Avenue). The adjacent lands to the east of Lot A and to the north of Lots B and C are being developed commercially. Lot D is bounded on the north and east by a housing subdivision. In 1993, the City of Las Vegas filed an application, serialized N-58090, requesting a direct sale of these lands to the city. The application, however, was amended to request a modified sale after BLM concluded that the lands would not be used for Governmental purposes. Meanwhile, an application for exchange, N-58563, was filed and reviewed, but later withdrawn. In addition, Hank Gordon of Laurich Properties (Laurich), described by BLM as the parent company of Parkway, contacted BLM in December 1995 about acquiring the subject lands. Consideration of a public sale was then suspended by BLM pending a determination on whether a modified competitive sale was appropriate. On October 18, 1998, the Southern Nevada Public Land Management Act, P.L. No. 105-263, 112 Stat. 2343, was enacted by Congress. Acting thereunder, BLM announced in January 1999 that it would proceed with disposal of the subject lands through a competitive sale, N-63198. A Notice of Realty Action was published on August 26, 1999, at 64 Fed. Reg. 46709. Laurich protested, thereby postponing the sale. The protest was dismissed on December 3, 1999.

In planning for the pending sale, BLM initiated appraisal and environmental reviews of the subject public lands. According to the case file, BLM contacted Laurich about concerns that construction activities on the adjacent tract, as observed by BLM personnel inspecting the sale site, had encroached upon the public lands and such trespass would complicate the sale process. (Memorandum to the file, dated July 12, 1999, indicating that Cheryl A. Ruffridge of BLM conversed with "Denise," who was responding to the telephone call for Gordon.) On February 7, 2000, BLM issued a notice to Parkway (attention: Gordon), stating that a field inspection of the subject public lands showed several unauthorized activities, i.e., parking large trucks, storing construction equipment, stockpiling construction materials, and piling waste materials. Laurich, acting on behalf of Parkway, confirmed to BLM in a letter received February 10, 2000, that all equipment and materials would be removed by February 9. In a letter to BLM dated March 20, 2000, Laurich described the situation as follows:

> [Laurich] received a copy of the GPS [Global Position System] map * * * which details a variety of areas of trespass. In reviewing the same with our General Contractor it was apparent that they had, in fact, temporarily placed materials and supplies in some of the noted areas. In providing a copy of the map to the contractor they have determined that an area of approximately 12,000 square feet was occupied by their materials, etc. In realizing the seriousness of the trespass and having not done so intentionally the contractor is willing to respond favorably to your proposed penalty.
>
> The remaining area of trespass appears to be a variety of old dunnage and debris which existed on the site prior to our purchase of same and therefore prior to our construction operations. In regards to the disposition of any penalties of these areas I do not believe either Laurich Properties, Inc. nor [sic] Bodie Construction, Inc. [the general contractor for Parkway] bear responsibility.

> The contractors['] infringement on the BLM property which has been determined as a trespass was not a willful trespass in that the contractors['] scope of work continued behind the curb line depicted on the GPS map for approximately 10' (to our property line). In clearing the onsite for the grading and paving operations the contractor directed the subcontractors to place their materials and equipment within the 10' behind the curb line and, unfortunately, during the rush to pave the project the subcontractors scattered their materials at random. All of the areas which were affected by the contractor have been cleaned and returned to the previous condition.

(March 20, 2000, Letter from Kevin Novak, Vice President of Design & Development, Laurich Properties, Inc., to Naomi Hatch, Realty Specialist, Las Vegas Field Office, BLM, at 1.)

On April 20, 2000, BLM issued its trespass determination. After describing the general location of the trespass and setting forth general principles regarding trespass, knowing and willful trespass, and liability, BLM concluded:

> The acreage in trespass has been determined to be three at the appraisal value of $8.00 per square foot. The appraisal value totals $1,045,440.00 for the three acres. The rental value is ten-percent of the appraised value which is $104,544.00 a year. Your use has been determined for a six-month period at $52,272.00 and will be tripled for willful trespass equaling $156,816.00.
>
> Also, rents to you by San Moritz for the use of public land to place a sign for advertising purposes must be reimbursed to the United States Government. The rental received by you began September 7, 1998 through March 31, 2000, in the amount of $450.00 a month totaling $8,310.00.

(April 20, 2000, Decision of Rex Wells, Assistant Field Manager, Division of Lands, Las Vegas Field Office, BLM, at 1.)

In its statement of reasons (SOR), Parkway explains that it is the owner of the parcel of land adjacent to the public lands at issue here and confirms that it hired Bodie Construction to act as general contractor for the development of this parcel for commercial use. Parkway relates that it did receive a trespass notice from BLM on February 7 and, upon discovering for itself that Bodie and its subcontractors had placed construction materials on the public lands, took immediate steps to abate the trespass by asking Bodie and the subcontractors to remove all offending items. Parkway reports that it notified BLM by letter dated February 9 that abatement measures had been undertaken and, when its representatives met with BLM personnel on February 18 to discuss the alleged trespass, "[a]n agreement was reached between Novak [for Parkway] and Wells [for BLM] that the penalty would be based upon comparable rents for construction storage based upon the actual square footage occupied." (SOR at 3.) It then sent a letter to BLM on March 20, it explains, where it advised BLM "that Bodie's materials

inadvertently occupied an area of approximately 16,000 square feet [and] the remaining areas of trespass appeared to be a variety of old debris that existed on the site prior to Bodie's construction operations." (SOR at 3.) Appellant notes that BLM did not respond to those statements but proceeded to issue the trespass determination. (SOR at 4.)

Parkway's initial assertion in presenting this appeal is a denial that it is the trespassing party. Parkway contends that BLM's inspections demonstrate that Bodie and its subcontractors were in violation. Noting that its construction contract specifically states that all work was to be done on Parkway's land, appellant argues that it had no reason to believe a trespass would occur and further contends that it is not liable for the trespass actions of an independent contractor. (SOR at 6.)

In defending Bodie and the subcontractors, appellant contends that BLM's determination is in error because BLM did not reference an appraisal report, did not explain how it ascertained the trespass period, did not substantiate its computation of the area of trespass, and did not justify the rationale for its determination of willful trespass. 2/ Arguing that the treble damages assessed by BLM are contingent on a showing of, first, "knowing or willful" use and, second, failure to timely resolve the trespass, Parkway contends that Bodie completed removal of all construction material and equipment within 72 hours after notice and that BLM did not demonstrate that the encroachment on public land was anything more than a misunderstanding by the contractor and subcontractors over the "property setback lines." (SOR at 7-9.) Appellant further asserts that all culpable parties have acted in good faith, a relevant factor in the measure of damages which was not addressed by BLM. As for the area of trespass, Parkway avers that the actual area inadvertently occupied was approximately 16,000 square feet (sq. ft.), 3/ and that BLM's assessment of trespass for 3 acres is an overstatement and patently unfair. (SOR at 11-12.) Appellant argues that only the area of actual use should be considered in a trespass determination and that BLM has not established that more lands than the 16,000 sq. ft. identified were involved.

In its answer, BLM rebuts Parkway's assertion that it is not the "responsible party" by asserting that appellant accepted responsibility, as developer and employer, in the February 9 letter, the February 18

2/ According to BLM's records, Parkway (through Novak) agreed that it would act as "mediator" between BLM and the responsible contractors, meaning it would negotiate on behalf of those in trespass, pay the applicable rental, and then collect from the contractors. (Conversation Record detailing Feb. 18, 2000, meeting between Wells, acting for BLM, and Novak, acting for Laurich.)

3/ The Mar. 20, 2000, letter from Novak to BLM identifies the trespass area as being "approximately 12,000 square feet." Parkway confirmed on appeal that the area is actually approximately 16,000 sq. ft. (SOR at 3, 11.) Sidney R. Bailey, President of Bodie Construction, declared: "Prior to removal of the construction debris and/or other trespassing materials, Bodie made an independent assessment of the approximate area of trespass. Bodie determined that the area of trespass was approximately 16,000 square feet." (SOR, Exh. C, Sidney R. Bailey's Affidavit at 3; cf. SOR, Exh. B, Novak's Affidavit at 3, 4.)

meeting, and the March 20 letter. (Answer at 4-5.) BLM further contends that the construction trespass was done "knowingly" since Parkway, through Gordon, its President, knew the lands adjacent to the development were public lands. (Answer at 7.) BLM avers that Gordon, acting at times for either Laurich or Parkway, offered to purchase the lands in 1995, pursued the modified sale offer in 1998, protested the public sale in 1999, and requested a lease for a "construction staging area" in 1999. (Answer at 8.) BLM further notes that appellant was apprised in July 1999 of BLM's concern over unauthorized use but did nothing to abate the situation until notice was issued in February 2000. BLM further rebuts Parkway's arguments that the encroachment was in "close proximity" to the "setback lines," contending that the areas of disturbance extend to 100 feet or more from the property line, nowhere near the "10 feet of setback" described by appellant. (Answer at 13.) BLM explains that its trespass computation was based on the map showing an area of 2.7 acres being occupied by construction trailers and equipment, construction materials, and construction debris and waste, and a calculation of 0.3 acres disturbed by the travel of vehicles to the waste piles or construction materials. (Answer at 12.) Relating that the regulations are not clear on the meaning of "not timely resolved," BLM argues that it has the broadest possible discretion in resolving unauthorized use on a fair and equitable basis. (Answer at 11.) Thus, it maintains, the assessment of penalties for willful trespass was warranted because the evidence demonstrates the parties knew, through Parkway, that they were using public lands without authorization and the trespass was significant over an extended period of time.

[1] Section 303(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1733(g) (1994), provides that: "The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary [of the Interior] * * * is unlawful and prohibited." Implementing regulations provide that "use, occupancy, or development of the public lands, * * * without authorization under the procedures in § 2920.1!1 of this title, shall be considered a trespass." 43 C.F.R. § 2920.1-2(a). Anyone determined to be in trespass by the authorized officer is entitled to notice of that fact and is liable to the United States for various costs and expenses, as listed in the regulations. 43 C.F.R. § 2920.1-2(a) and (b). Under 43 C.F.R. § 2920.0-5(m), "knowing and willful" is defined as "[a] consistent pattern of performance or failure to perform * * * sufficient to establish the knowing or willful nature of the conduct, where such consistent pattern is neither the result of honest mistake [n]or mere inadvertency."

As noted in the regulation itself, the applicability of 43 C.F.R. § 2920.1!2 hinges on whether the use, occupancy, or development of the public lands was without authorization under the procedures in 43 C.F.R. § 2920.1!1. See William H. Snavely, 136 IBLA 350, 356 (1996). According to 43 C.F.R. § 2920.1-1, "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part." See 43 U.S.C. § 1732 (1994) (Secretary's authority to regulate use through permits, licenses, etc.) As we find no apparent statutory or regulatory provision which specifically authorizes or forbids the use and occupancy of public lands for construction storage or staging, we construe those uses cited in the trespass notice to be among those subject

to authorization under 43 C.F.R. § 2920.1-1. Thus, the continued presence of construction equipment, materials, and waste on BLM property without authorization under 43 C.F.R. § 2920.1-1 constituted a trespass, and subjected the offending parties to trespass liability under section 303(g) of FLPMA, supra, and 43 C.F.R. § 2920.1-2.

The record does not demonstrate, nor is it argued, that either Parkway or Bodie and its subcontractors (henceforth, Bodie and the subcontractors are referred to jointly as the "contractors") had authorization under § 2920.1-1 to occupy the land in question. Further, appellant has not objected to BLM's determination that a trespass has occurred. The issues therefore before us are the extent of the trespass, its duration, whether treble damages were appropriate, and whether the fair market rental value assessed was proper. 4/

[2] For its part, BLM is obliged to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision and demonstrated in the administrative record that accompanies that decision. Larry Brown & Associates, 133 IBLA 202, 205 (1995). As noted by appellant, in discussions with BLM prior to the issuance of the decision it represented that Bodie had estimated the disturbed area as approximately 12,000 sq. ft., a figure appellant later revised to 16,000 sq. ft. However, in its decision BLM determined that the trespass embraced substantially more land, 3 acres, or 130,680 sq. ft. BLM's determination appears to be based on a map prepared utilizing GPS technology to show the location and area of the disturbances. On this map, dated February 1, 2000, titled "Summerlin-Buffalo Trespass," BLM lands are shaded in yellow and disturbed areas therein are depicted in red. The nature of each disturbance is identified in a shadow box. BLM also photographed the disturbances, but the photographs are not correlated with the map. While not identified on the map as such, the areas are easily correlated to lots A-D. See n.1, supra.

In the record, BLM identifies Lots A, B, and D as containing 2.5 acres each and Lot C as embracing 5 acres. Running through those lots generally from northwest to southeast is a fence designated on the map as the "Summerlin Parkway Right-of-way fence." All the disturbances shown on the map lie to the east of that fence. In addition, while BLM's decision lists the areas of all four lots, by aliquot parts, as being the "[p]ublic land trespass location," the record does not support such a conclusion. The Summerlin-Buffalo Trespass map does not depict any trespass disturbances in Lot C or Lot D. All the trespass areas are located east of the fence in either Lot A or Lot B. Another map in the record shows the square footage of the areas in Lots A and B lying east of the fence to be 68,635

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4/ It is noticeable from our list of issues that we do not include appellant's argument that it is not liable here. In light of our disposition of this matter, this issue may again be addressed by the parties on remand. However, to facilitate our discussion here, we will assume that appellant has acquiesced to liability for the trespass on behalf of Bodie and the subcontractors in order that this appeal may be considered.

sq. ft. and 55,176 sq. ft., respectively, or approximately 2.84 acres. 5/ BLM stated in response to appellant's SOR:

> The map [Summerlin-Buffalo Trespass map] shows the acreage used and disturbed by the construction debris, soil, and other waste; the storage areas for construction materials and equipment; the debris and equipment cleanout areas; and the construction trailer site. This amounted to 2.7 acres. In addition, the BLM calculated 0.3 acres for land used and disturbed by travel of vehicles and equipment to and from the waste piles or construction materials.

(Answer at 12.)

However, BLM's explanation of its determination to claim trespass damages for 3 acres is not found in the record forwarded to the Board. Nor does the record support such a claim. The disturbances shown as existing in Lots A and B on the Summerlin-Buffalo Trespass map do not encompass the entire area in Lots A and B lying east of the fence or even a large percentage of it. Moreover, appellant contends that not all the disturbances can be attributed to the contractors' activities. In a letter to BLM dated March 20, 2000, Novak admitted that Bodie had utilized certain areas of the public lands, but that "the remaining areas of the trespass appear to be a variety of old tonnage and debris that existed on the site prior to Bodie's construction operations." (SOR, Exh. B at 3, Affidavit of Kevin Novak, dated June 14, 2000.) In that same letter, Novak proposed a meeting with BLM to "reach an agreement on the square footage of the trespass." (SOR at 4.) There is no evidence that such a meeting took place.

While appellant does not deny that a trespass occurred, the present record does not support BLM's conclusion that appellant is responsible for a trespass of 3 acres of public land. Therefore, we must set aside BLM's decision to the extent it claimed that appellant is responsible for a trespass on 3 acres of public land and remand the case to BLM for reassessment, including consideration of whether all the areas of trespass are appellant's responsibility.

[3] The next question is whether the record supports BLM's conclusion regarding the duration of the trespass, which BLM stated in the decision was 6 months. There are only two documents in the record relating to this question. The first is a "Conversation Record," dated July 12, 1999, recounting a telephone call to Laurich on that date between a BLM employee and "Denise for Hank Gordon." The BLM employee stated that she informed Denise of the proposed public sale of the lands in question on November 4, 1999, and that "we had some concerns that the construction had encroached onto the public land which would constitute trespass." She also stated that she recommended that Laurich contact the construction company and

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5/ The map was attached to a Feb. 2, 1999, letter from K. Don Dunn, a Nevada State Office appraiser, to Cheryl Ruffridge, Las Vegas Field Office. Therein, he stated that the map was prepared as part of his appraisal of the subject lands completed in October 1998 and contained in file number N-58090.

"advise them of the public land and the need to avoid it." The BLM employee recounted that Denise stated that she would do so. The other document in the record relating to the duration of the trespass is another "Conversation Record," dated February 18, 2000, in which BLM's Wells detailed his meeting of that date with Novak. Wells stated that he "explained [to Novak] that our records did not show dates for the initiation of the various uses." He further stated that he and Novak had agreed that Novak "would check records and identify a date through letter" and because Novak did not want to determine when each separate occurrence took place, he "would use one date to cover the entire trespass." There is no evidence in the record that Novak identified a date. In that regard, Novak asserts, however, that "[t]he BLM reached its decision regarding the trespass before I was permitted to provide my written statement concerning the nature of the trespass." (SOR, Exh. B at 4.)

Appellant does not directly challenge BLM's utilization of 6 months as unreasonable. What it states is that "BLM has never provided Parkway with any explanation of how the decision was reached with respect to the * * * duration of the trespass." (SOR at 12.) We sympathize with appellant's predicament. As noted above, only two record documents bear on the question, one of which indicates the parties were going to attempt to reach an agreement on the duration of the trespass. Due to lack of information in the case record to support a determination that 6 months is the appropriate time period, that part of BLM's decision is also set aside. 6/ On remand, BLM and appellant are encouraged to agree on the appropriate time period for the trespass.

[4] Anyone properly determined by BLM to be in trespass on Federally-owned lands shall be liable to the United States for damages, including the fair market value rental of the lands for the current year and past years of trespass, and the administrative costs incurred by the United States as a consequence of such trespass. 43 C.F.R. § 2920.1-2(a)(1) and (2); see Michael and Karen Rodgers, supra; Sierra Production Service, 118 IBLA 259, 263 (1991). BLM's assessment of trespass damages was based on the appraisal report showing a fair market value (FMV) of $8 per sq. ft. BLM valued the annual rental as 10 percent of the FMV.

As noted, an appraisal of the lands in Lots A through D was performed in October 1998 for the anticipated land sale, reporting an FMV of $2,230,000 for 7.54 usable acres within the 12.5-acre area. This report was updated in July 1999 (with the FMV increased to $2,275,000) and again in February 2000 (no increase in the FMV). The original report employed estimated values of $7.85 per sq. ft. for lands in Lots A, B, and C and $4.30 per sq. ft. for lands in Lot D based on sales of comparable lands nearby (shopping center sites). (October 1998 Appraisal Report Summary

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6/ Departmental regulation 43 C.F.R. § 2920.1-2(a) expressly provides that a party determined to be in trespass on the public lands shall be liable for "[t]he fair market value rental of lands for the current year and past years of such trespass." The regulation is intended to require that BLM assess fair market value rental for the actual time of the trespass. See Michael and Karen Rodgers, 137 IBLA 131, 135 (1996).

at 9.) The July 1999 report increased the sq. ft. values to $8 and $4.40, respectively, based upon a 2-percent annual time adjustment set forth in the original report and comparable sales reviewed in 1999. (Attachment, July 1999 Report, at 1.) The February 2000 report retained the values set by the July 1999 report based on the appraiser's research of comparable sales. (Attachment, February 2000 Report, at 1.)

As a rule, BLM's FMV determination will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous. Regina B. Perry, 142 IBLA 278, 281 (1998); Gerald L. Overstreet, 112 IBLA 211, 214 (1989). Where there is no showing of error in BLM's appraisal method, it normally must be rebutted by another appraisal. Russell A. Beaver, 121 IBLA 386, 392 (1991); Great Co., 112 IBLA 239, 242 (1989). As the last appraisal report coincides with issuance of the trespass notice, its use is appropriate to determine trespass damages in the absence of error demonstrated by appellant. BLM's application of 10 percent of the FMV as the basis for the FMV rental has not been challenged by appellant, and we find nothing in the record or appellant's presentation suggesting further scrutiny of this process is needed.

[5] We next consider appellant's assertion that BLM improperly assessed treble damages. As noted, a party deemed to be in trespass is liable under 43 C.F.R. § 2920.1-2(a) for the FMV rental, administrative costs, and reclamation costs. However, added penalties may be imposed under 43 C.F.R. § 2920.1-2(b) as follows:

> (b) In addition, the following penalties may be assessed by the authorized officer for a trespass not timely resolved under paragraph (a) of this section and where the trespass is determined to be:
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> > (1) Nonwillful, twice the fair market rental value which has accrued since the inception of the trespass, not to exceed a total of 6 years; or
> >
> > (2) Knowing and willful, three times the fair market rental value which has accrued since the inception of the trespass, not to exceed a total of 6 years.

BLM concluded that treble damages were warranted under the circumstances.

Appellant asserts in its SOR that, in order for the regulation to apply, the contractors' actions "would have to be voluntary or conscious performance * * * with knowledge that the placement of construction materials constituted a trespass on BLM property." (SOR at 9.) Describing the contractors' actions as inadvertent placement of materials outside of the landscaping setback, appellant contends that any act that is an honest mistake or merely inadvertent is specifically excluded from the definition. Id. Moreover, appellant asserts that BLM has not shown the contractors acted knowingly, willfully, indifferently, or with reckless disregard. Appellant also notes that, due to the discretionary nature of treble

damages, the contractors' good faith in abating the trespass is relevant to determining the measure of damages in that the trespass was timely resolved. (SOR at 10.)

BLM responds by asserting that its determination was proper in light of appellant's knowledge that the lands adjacent to its construction site were public and the fact that the trespass embraced lands well beyond the 10-foot landscaping setback. (Answer at 7-9.) BLM also references its observation to appellant in July 1999 regarding the trespass and notes that nothing was done to abate the encroachment until much later. Id. BLM also comments that appellant's good-faith argument has no merit here because the trespass was done knowingly and persisted for several months. (Answer at 11.)

The initial question posed by the application of 43 C.F.R. § 2920.1-2(b) here is the significance of the phrase "not timely resolved" and whether BLM's determination regarding this factor is supported in the record. This phrase is not defined in the regulations and the preamble to the promulgation of 43 C.F.R. § 2920.1-2 stated: "The final rulemaking has not adopted the suggestion that the phrase 'not timely resolved' be defined." 52 Fed. Reg. 49114 (Dec. 29, 1987). BLM provided the following explanation:

> The phrase is used in an effort to give the Bureau of Land Management official responsible for dealing with an unauthorized use the broadest possible discretion in resolving that unauthorized use on a fair and equitable basis. The ultimate decision on whether or not an unauthorized use has been resolved in a timely manner will lie with the appropriate State Director.

Id.

Appellant asserts that "the failure to 'timely resolve' the trespass is a condition precedent to imposition of treble damages," and that because the trespass was abated within 72 hours of receipt of BLM's February 7, 2000, notice of trespass, the imposition of treble damages is inappropriate. (SOR at 8.) Thus, appellant would have us mark the time for resolution of the trespass strictly from the date of receipt of official notice thereof. We must agree with appellant that such is the interpretation required by the regulation. 7/

The regulation, 43 C.F.R. § 2920.1-2(b), allows BLM to assess more than fair market rental value for unauthorized uses of the public land in

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7/ Under such a construction, however, a person could knowingly trespass on public lands with impunity for months or even years, await official notice from BLM of its illegal activities, and upon receipt thereof, immediately abate the trespass, and thereafter, claim that, due to its timely resolution of the trespass, treble damages could not be imposed. Nevertheless, the Department's self-imposed restriction on imposition of treble damages for unauthorized use allows such a trespasser to escape treble damages.

very limited circumstances, i.e., only when the "trespass is not timely resolved under paragraph (a)." In such a circumstance, it may collect double the fair market rental value for a nonwillful trespass and triple the fair market rental value for a knowing and willful trespass. Paragraph (a) of the regulation requires notice to anyone determined by BLM to be in trespass on the public lands. The regulation appears to contemplate that such notice include the terms and conditions under which the trespasser must rehabilitate and stabilize the land, including the establishment of a time period in which to do so. 8/

The preamble to the promulgation of the regulation indicates that BLM intended to allow its officials broad discretion in addressing unauthorized trespass situations, including the determination of what constitutes timely resolution of a trespass. Therefore, in each case in which BLM's imposition of treble damages is challenged, the circumstances of the case must be examined in order to determine if such imposition was appropriate under 43 C.F.R. § 2920.1-2(b)(2). However, that determination must include two elements. BLM must find both that the trespass was not timely resolved, and that it was knowing and willful in order to justify the demand for such damages. 9/

In this case, Wells sent a notice, dated February 7, 2000, to appellant stating that certain unauthorized activities had taken place on public lands for which he provided a legal description. However, he did not require rehabilitation and stabilization or establish a time deadline therefor. He did state: "I would appreciate meeting with you to discuss resolution of this matter." Novak asserts that immediately upon receipt of that letter he contacted Bodie. Bailey states that removal of construction materials and/or debris was completed within 72 hours of notification by Novak. BLM does not dispute this.

Wells explained in an affidavit accompanying BLM's answer that his analysis proceeded by examining whether the trespass was knowing and willful. (Answer, Exh. D at 2.) He stated that he asked two questions--whether the trespasser knew or should have known that the land was public land and whether the trespasser knew or should have known that authorization was required to use the public land. He answered yes to both questions on the basis of the following information set forth in his affidavit: Gordon, president of Laurich, had knowledge that the land was public land as early as January 1998. Id. Laurich was informed of a potential trespass on July 12, 1999. Id. at 3. Public notice that the parcel was being

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8/ "Rehabilitating and stabilizing the lands that were the subject of such trespass, or if the person determined to be in trespass does not rehabilitate and stabilize the lands determined to be in trespass within the period set by the authorized officer in the notice, he/she shall be liable for the costs incurred by the United States in rehabilitating and stabilizing such lands." 43 C.F.R. § 2920.1-2(a)(3).

9/ The preamble, cited supra, states that the ultimate decision on whether a trespass has been resolved in a timely manner will lie with the "appropriate State Director." 52 Fed. Reg. 49114 (Dec. 29, 1987). Presumably, there is a delegation of authority allowing Field Managers to make such determinations.

considered for competitive sale occurred in August and September 1999. Id. In October 1999, Laurich protested the proposed sale of the parcel. BLM dismissed that protest in December 1999. Id. In the fall of 1999, Gordon contacted Wells to request a lease to utilize the public land for a construction staging area, but Wells told Gordon that a lease would not be considered "because the parcel had been identified for sale in the November 4, 1999, auction." Id. Novak admitted to Wells that Novak was aware that the land was public land and that Novak had "warned Laurich Properties contractors not to use the public land." Id. at 4. The private property adjacent to the public land is within the city limits of the City of Las Vegas. The city has requirements for detailed site plans to be submitted by developers. "These plans, once approved, are provided to the contractor. I operated on the assumption that Parkway Retail Centre and Laurich Properties possessed this type of plan which would have given them notice of the boundaries of the private land being developed." Id. Off-site improvements, such as curb and gutter, on the private property were constructed to the private property line, indicating to Wells "that the contractor would have had knowledge of the location of the property boundaries." Id. Disturbances were not limited to areas adjacent to the property boundary with the private lands and, therefore, "could not be explained as an inadvertent encroachment onto the public land." Id. at 5. On the basis of that information, Wells concluded that appellant "knowingly and willfully trespassed on the subject land."

Appellant's assertion that the contractors' actions were honest mistakes or merely inadvertent seems unlikely in light of all the factors cited by Wells. Thus, we conclude that the record supports Wells' conclusion that the trespass was knowing and willful. However, the record contains no finding by Wells on the issue of timely resolution of the trespass, a necessary finding to justify the damage demand made in this case. Appellant asserts, and BLM does not dispute, that it resolved the trespass within 72 hours of receipt of the February 7, 2000, notice, which did not set a deadline for resolution, but only invited appellant to discuss the matter. We find, based on the record, that appellant timely resolved the trespass. Accordingly, the demand for three times the fair market rental value is not justified under the regulations. Accordingly, to the extent BLM required payment of three times the fair market rental value, its decision is reversed. On remand, it is limited to collection of fair market rental value for the extent and duration of the trespass.

Finally, we address BLM's request for restitution of rental received by appellant for a sign placed on public land without authorization. Appellant's only response to this matter is found in its Petition for Stay, where it states "that this sign was on the property prior to [its] purchase of the contiguous and adjacent property for its development." (Petition at 3.) Appellant reports that, up until it was notified by BLM, it believed the San Moritz sign was on its property and not on public land. Id. We find that appellant has not challenged BLM's decision or its rationale in this matter. The record clearly establishes that appellant knew or should have known the location of the boundary between its private land and the land in question. Moreover, this rental was not included as part of the trespass damages contested by appellant in the Petition for Stay or SOR. (SOR at 4; Petition at 4.) We therefore need not address the appropriateness of reimbursement in light of appellant's apparent acquiescence in the matter.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed with regard to the rent demanded for the existing sign on the land in question, reversed as to the determination that the appellant is liable for treble damages, and set aside and remanded as to the extent of the area covered by appellant's trespass and the duration of that trespass. The parties are encouraged to meet and resolve these matters.

James P. Terry
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge